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# LANGUAGE THAT LIMITS EMPLOYER LIABILITY IN MASSACHUSETTS

JOHN J. FERRITER\*

## INTRODUCTION\*\*

As a general rule, people should choose their words carefully. However, where employment law is concerned, this maxim is critical. Cases have been decided based entirely upon the use of specific words in an employment relationship. This Article addresses various methods of avoiding employer liability throughout the employment relationship, and includes discussions of employer conduct: during the solicitation of employees, during the interviewing process, during employment, and after the employment of a particular individual ends. What follows is a discussion of language employers should use, language employers should avoid, and suggestions intended to help employers legally obtain information about employees, simply by using the proper language.

## I. HELP WANTED ADVERTISEMENTS

Employers frequently solicit employees through the use of help wanted advertisements. However, such advertisements, if improperly drafted, may expose employers to potential liability. Help wanted advertisements present the unusual situation in which an employer attempts to present a position in a favorable light while at the same time seeking to avoid liability. For example, an employer does not want to commit to so many details that the advertisement presents a legal "offer" that can be legally "accepted" simply by filling out the application. If such an "offer" were presented, basic

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\*\* Parallel citations have been added to this Article for the convenience of Massachusetts' practitioners.

contract principles would allow acceptance according to the terms of the advertisement.<sup>1</sup>

Fortunately for employers, the general rule is that an advertisement will not constitute an offer.<sup>2</sup> However, courts in some states have held that help wanted advertisements containing specific terms may bind employers to the language of the advertisement.<sup>3</sup> In fact, even ambiguous language has been construed against employers in certain jurisdictions.<sup>4</sup>

Not only do preparers of help wanted advertisements need to be aware of the specificity of language used, but they must also exercise care to avoid language that could be construed as discriminatory. "It is well settled that Title VII [of the Civil Rights Act] prohibits an employer from indicating a preference based on sex in its advertisements . . . ."<sup>5</sup> However, there is some question as to whether employers can use sex-referent language such as "patrolman" or "metermaid" when soliciting employees.<sup>6</sup> Due to this uncertainty, an employer's best course of action may be to replace all such terminology with sex-neutral terms.

Another area of concern arises in the context of individuals with disabilities. For instance, employers must ensure that positions, as advertised, are accessible to all individuals, including those with disabilities.<sup>7</sup> In fact, employers must ensure that the adver-

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1. See ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 41, at 68 (one vol. ed. 1952) ("When an offer has been made by publication, to a large number of unidentified persons, a power of acceptance is created in all those who read it.").

2. See *id.* § 25, at 43 ("It is quite possible to make a definite and operative offer . . . by advertisement, in a newspaper . . . or on a placecard in a store window. It is not customary to do this, however, and the presumption is the other way.").

3. See *Willis v. Allied Insulation Co.*, 174 So. 2d 858, 860-61 (La. Ct. App. 1965) (deciding that a newspaper help wanted advertisement reading "[p]rofessional training program w/\$450.00 monthly guarantee if qualified" constituted a binding employment contract when the plaintiff answered the advertisement and was accepted for the position).

4. See *id.* at 861 (citing *Johnson v. Capital City Ford Co.*, 85 So. 2d 75 (La. Ct. App. 1955)).

5. EEOC: *Policy Guide on Sex-Referent Language in Job Advertising*, 8 Lab. Rel. Rep. (BNA) (405 Fair Empl. Prac. Man.) 6847, 6847 (Apr. 16, 1990) [hereinafter *EEOC Policy Guide*]; see also 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. II 1996).

6. See *EEOC Policy Guide*, *supra* note 5, at 6847-48. The Equal Employment Opportunity Commission appears to believe that the use of some terms, such as "chairman," may be acceptable. This stems from the fact that such terms have gained a colloquial status wherein they are frequently used to refer to any individual, male or female. See *id.* at 6847. However, use of terms which can be interpreted solely as applying to one sex may be deemed discriminatory. See *id.* at 6847 n.2 (using the terms "waitress" and "waiter" as examples).

7. See MASS. GEN. LAWS ch. 151B, § 4(3) (1996).

tisements themselves are accessible to those with disabilities; it should be noted that there is no obligation, in advance, to provide advertisements in various formats, but employers must make accessible formats available upon request.<sup>8</sup>

Unless preparers of help wanted advertisements address these concerns, employer liability may exist. In fact, after employers receive responses from prospective employees, they must continue to exercise care during the application process as well. The following section discusses specific instances of the application process where there exists the potential for employer liability.

## II. EMPLOYMENT APPLICATIONS

An employment application is a device that employers use to gather important, usually personal, information about prospective employees. Unfortunately for employers, a number of federal and state laws limit the type of information that an employment application may seek to obtain.<sup>9</sup> As a result, requesting certain improper information can subject an employer to liability.

While not all inclusive, information that employers should exercise care in inquiring about during the application and hiring processes are discussed in the following sections. Among the areas where care must be exercised are the following: criminal records, lie detector tests, commercial vehicle operation experience, and volunteer work.

### A. *Criminal Records*

Many employers attempt to discover whether an applicant for employment has a criminal record. However, it is important to realize that if an application asks about criminal convictions, the application also must include the following language:

“An applicant for employment with a sealed record on file with the commissioner of probation may answer ‘no record’ with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a sealed record on file with the commissioner of probation may answer ‘no record’ to an inquiry herein relative to prior arrests or

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8. See *EEOC: Technical Assistance on Title I of ADA*, 8 Lab. Rel. Rep. (BNA) (405 Fair Empl. Prac. Man.) 6981, 7027 (Jan. 27, 1992) [hereinafter *ADA Assistance Manual*].

9. See *infra* Part II.A-E for a discussion of the limits on information which an application may seek to obtain.

criminal court appearances. In addition, any applicant for employment may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution."<sup>10</sup>

Under Massachusetts law, it is unlawful for an employer to inquire about an applicant's criminal history unless the employer limits his inquiry to criminal conduct that occurred within five years of the time of application.<sup>11</sup> After five years, the applicant has a right to withhold such information from the employer if the applicant so chooses. In regard to past criminal conduct, the General Laws of Massachusetts provide that it shall be unlawful

[f]or an employer, himself or through his agent, in connection with an application for employment . . . to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.<sup>12</sup>

Accordingly, it is unlawful to elicit such information from the applicant.

Nonetheless, it is not unlawful for an employer to gather the same information through the use of the Criminal History Systems Board, a board established by the laws of Massachusetts to exercise

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10. MASS. GEN. LAWS ch. 276, § 100A (1996). It should be noted that the repetitive language of the statute stems from a poorly drafted amendment to the provision in 1973. See *An Act Providing for the Sealing of Certain Records of Conviction for the Possession of Marihuana*, 1973 Mass. Acts 1164.

11. See MASS. GEN. LAWS ch. 151B, §4(9) (1996).

12. *Id.*

control over the criminal offender record information system and access to this information.<sup>13</sup> Under the Criminal Offenders Record Information Act ("CORI Act"),<sup>14</sup> eligibility to receive such information is limited to law enforcement officials and some potential employers.<sup>15</sup> If the board determines that the need for criminal record information outweighs the individual's privacy and security interests, the board will certify a requesting employer eligible to receive such information.<sup>16</sup> In *Bynes v. School Committee*,<sup>17</sup> two school bus drivers were terminated because of their past criminal records.<sup>18</sup> The school committee had requested criminal records from the Criminal History Systems Board, pursuant to the CORI Act, for each of the districts' bus drivers.<sup>19</sup> The plaintiffs contended that the school committee violated chapter 151B, section 4(9) of the General Laws of Massachusetts, when it sought information under the CORI Act.<sup>20</sup> However, the Massachusetts Supreme Judicial Court disagreed with the plaintiffs' interpretation of the statute, choosing instead to interpret the statute narrowly.<sup>21</sup> The court held that the legislative intent of the statute was "merely to protect employees from requests from their employers and not to proscribe employers from seeking such information elsewhere."<sup>22</sup> Thus, it is clear that if an employer wishes to lawfully retrieve the criminal histories of its applicants or employees while avoiding liability, the employer must do so by means other than inquiring with the employee directly.

### B. *Polygraph Tests*

In certain circumstances, employers may wish to inquire about a prospective employee's past through the use of a polygraph, or lie detector, test in order to assess the honesty and trustworthiness of the applicant. In Massachusetts, however, it is unlawful to request

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13. See *Bynes v. School Comm.*, 411 Mass. 264, 268-69, 581 N.E.2d 1019, 1021-22 (1991); see also MASS. GEN. LAWS ch. 6, § 168 (1996).

14. MASS. GEN. LAWS ch. 6, §§ 167-172 (1996).

15. See *id.* § 172.

16. See *id.* § 172; see also *Bynes*, 411 Mass. at 265, 581 N.E.2d at 1020.

17. 411 Mass. 264, 581 N.E.2d 1019 (1991).

18. See *id.* at 264-65, 581 N.E.2d at 1020.

19. See *id.* at 265, 581 N.E.2d at 1020.

20. See *id.* at 266-67, 581 N.E.2d at 1020-21.

21. See *id.* at 267, 581 N.E.2d at 1021.

22. *Id.* at 268, 581 N.E.2d at 1021.

that an applicant undergo such a test.<sup>23</sup> In fact, employment applications are required to include the following language: "It is unlawful in Massachusetts to require or administer a lie detector test as a condition of employment or continued employment. An employer who violates this law shall be subject to criminal penalties and civil liability."<sup>24</sup>

Federal law also prohibits employers engaged in or affecting commerce<sup>25</sup> from compelling employees or applicants to submit to a lie detector test.<sup>26</sup> Further, federal law makes it unlawful for an employer to use, accept, refer to, or inquire concerning the results of such tests. Federal law exempts certain employers from these prohibitions: government employers, national defense and security employers, FBI contractors, security services, and employers authorized to manufacture, distribute, or dispense controlled substances.<sup>27</sup>

Under federal law, an employer may request an employee to submit to a lie detector test if it is administered pursuant to an ongoing investigation involving economic injury or loss to the employer's business, if the employee had access to the property in question, and there is a reasonable suspicion that the employee was involved in the injury or loss.<sup>28</sup> Before such a polygraph test may be administered, the employer must provide the employee with a statement setting forth the incident being investigated, a description of the employer's reasonable suspicions, and a statement indicating the employee's access to the property.<sup>29</sup>

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23. Chapter 149, section 19B(1) of the General Laws of Massachusetts defines lie detector tests as

any test utilizing a polygraph or any other device, mechanism, instrument or written examination, which is operated, or the results of which are used or interpreted by an examiner for the purpose of purporting to assist in or enable the detection of deception, the verification of truthfulness, or the rendering of a diagnostic opinion regarding the honesty of an individual.

MASS. GEN. LAWS ch. 149, § 19B(1) (1996).

24. *Id.* § 19B(2)(b).

25. The phrase "engaged in or affecting commerce" has historically been interpreted broadly so that courts will almost always determine that an employer is engaged in or affecting commerce. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964) (interpreting a statute regulating all activity that affects interstate commerce as showing congressional intent to reach as far as the commerce clause permits, and holding that the commerce clause permits Congress to forbid a policy of segregation, even at a local hotel).

26. *See* 29 U.S.C. §§ 2001-2009 (1994).

27. *See id.* § 2006.

28. *See id.* § 2006(d).

29. *See id.*

Violations of the polygraph laws carry different penalties at the state and federal level. For violating Massachusetts law, an employer subjects itself to fines of not less than \$300 nor more than \$1,500, and possible imprisonment for not more than 90 days, depending on the number of offenses.<sup>30</sup> Under federal law, a \$10,000 penalty can be assessed against an employer for unlawfully compelling polygraphs.<sup>31</sup> As such, the employer would be well advised to take caution and seek legal counsel before requiring an employee or potential employee to submit to a polygraph examination.

### C. *Commercial Motor Vehicle Operators*

In certain circumstances, an application may ask about the applicant's commercial motor vehicle experience. These applications usually ask for a list of employers for whom the applicant has worked as a commercial motor vehicle operator during the past ten years, including the dates of employment and reasons for leaving.<sup>32</sup> Employers typically require verification of the applicant's commercial motor vehicle work experience in order to protect themselves from liability created by Massachusetts statutes.

Specifically, chapter 90F, section 4 of the General Laws of Massachusetts makes an employer liable for knowingly allowing, permitting, or authorizing any applicant to operate a commercial motor vehicle during any period in which the driver has lost the privilege in any state to drive a commercial motor vehicle. The statute mandates that the employer must "knowingly" authorize such a violation,<sup>33</sup> and therefore employers must educate themselves as to an applicant's legitimate qualifications to operate a commercial motor vehicle. To avoid "knowingly" violating the statute, employers should require applicants to certify the truthfulness of information given regarding the past operation of commercial motor vehicles. Requiring such certification from the applicant is evidence that the employer affirmatively exercised reasonable diligence to ensure that the applicant possessed a valid, active license to operate a commercial motor vehicle, thereby negating the inference that the employer "knowingly" violated the statute.

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30. See MASS. GEN. LAWS ch. 149, § 19B(3) (1996).

31. See 29 U.S.C. § 2005(a)(1).

32. See MASS. GEN. LAWS ch. 90F, § 4 (1996).

33. *Id.*



#### D. *Volunteer Work*

Employment applications often ask about a candidate's prior work history. Massachusetts law mandates that applications asking about a prior work history must affirmatively state that the applicant is permitted to include volunteer work that may be verified as part of the applicant's work history.<sup>34</sup>

Beyond this application stage of the employment relationship, there remains the potential for employer liability. For instance, following the application process, employers typically interview prospective employees, and in so doing, subject themselves to potential liability. The following sections describe the proper manner to address the concerns which an employer may have regarding the interviewing process while at the same time avoiding employer liability.

#### E. *Other Language*

In addition to what is typically on an application, the employer should include notice of certain other topics on application forms to avoid inadvertently violating various federal and state laws enacted to protect applicants and employees. Pursuant to federal and state statutes, it may be in an employer's best interest to include statements regarding the following areas of law: (i) equal employment opportunity, acknowledging that the employer will not discriminate on the basis of race, gender, national origin, religious beliefs, or sexual preference;<sup>35</sup> (ii) immigration reform and control, acknowledging that the employer will not knowingly hire illegal aliens;<sup>36</sup> (iii) testing requirements prior to or subsequent to employment, providing applicants with notice of expected health or preference test-

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34. See MASS. GEN. LAWS ch. 149, § 52B (1996).

35. See 42 U.S.C. § 2000e-2(a) (1994). Section 2000e-2(a) provides the following:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*Id.*

36. See 8 U.S.C. § 1324(a) (1994) (prohibiting employers from knowingly hiring an illegal alien or not complying with verification procedures).

ing;<sup>37</sup> (iv) at-will employment declaration, stating that employees can be terminated at any time for any reason or for no reason at all;<sup>38</sup> (v) statement requiring certification that the information provided by the applicant is true and complete, and providing notice to employees that the employer will rely on the information provided and that falsification thereof is cause for dismissal;<sup>39</sup> and (vi) a waiver and authorization to verify information, speak to references, and conduct criminal and credit checks and giving the employer the right to obtain information from third parties.<sup>40</sup>

By including statements regarding the above referenced topics on employment applications, employers ensure their compliance with state and federal laws, thereby avoiding potential liability. Further, the employer provides itself with an avenue to terminate the employee if the application is incorrect.

### III. THE EMPLOYMENT INTERVIEW

Just as employers must be careful regarding the questions they ask on employment applications, they must also exercise care during any personal interviews that they conduct. Precautions must be taken regardless of whether the interview is the result of a help wanted advertisement in the newspaper or an unsolicited application for employment.

Certain questions may not be asked during a personal interview, but impermissible inquiries can often be replaced with permissible inquiries that reveal the information the employer wishes to gather. An employer should not ask if an employee has a disability that would interfere with his or her ability to fulfill the job requirements, as such a question would violate chapter 151B, section 4(16) of the General Laws of Massachusetts.<sup>41</sup> However, an em-

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37. See *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. 507, 514-15 (D. Mass. 1974). The employer must show that any exam administered is in fact "substantially related" to the job performance. Cf. *Cox v. New Eng. Tel. & Tel. Co.*, 414 Mass. 375, 380, 386, 607 N.E.2d 1035, 1038, 1042 (1993) (holding that the test used was related to job performance, and thus that it was proper to be required for the job).

38. See *Jackson v. Action for Boston Community Dev. Inc.*, 403 Mass. 8, 9, 525 N.E.2d 411, 412 (1988).

39. See generally *Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), *abrogated on other grounds by McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

40. See MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC., DOCUMENTING THE HIRING PROCESS 7 (1996).

41. See MASS. GEN. LAWS ch. 151B, § 4(16) (1996). Section 4(16) provides the following:

An employer may not make a preemployment inquiry of an applicant as to

ployer is not prohibited, either by statute or case law, from asking whether an applicant can perform the functions of the job with or without reasonable accommodation.<sup>42</sup>

In addition, an employer should not ask how many days the applicant was sick last year or whether the employee ever filed a worker's compensation claim; such a question would violate chapter 152, section 75B(2) of the General Laws of Massachusetts.<sup>43</sup> However, an employer is not prohibited by statute or case law from asking whether an employee can meet the attendance requirements of the job.<sup>44</sup>

Further, an employer should not ask an applicant if he or she has ever been treated for an alcohol or mental health problem, or inquire as to what drugs the applicant is currently taking. Questions phrased in this manner may potentially violate chapter 151B, section 4(9A) of the General Laws of Massachusetts.<sup>45</sup> However, an employer may ask an applicant about illegal drug or alcohol use so long as the question asked is not likely to elicit information about drug addiction or alcoholism, as these are disabilities covered by the Americans with Disabilities Act ("ADA").<sup>46</sup>

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whether the applicant is a handicapped individual or as to the nature or severity of the handicap, except that an employer may condition an offer of employment on the results of a medical examination conducted solely for the purpose of determining whether the employee, with reasonable accommodation, is capable of performing the essential functions of the job, and an employer may invite applicants to voluntarily disclose their handicap for purposes of assisting the employer in its affirmative action efforts.

*Id.*

42. See *EEOC: Enforcement Guidance on Pre-Employment Inquiries Under the Americans with Disabilities Act*, 8 Lab. Rel. Rep. (BNA) (405 Fair Empl. Prac. Man.) 7191, 7192 (Oct. 10, 1995) [hereinafter *Enforcement Guidance*]; see also *ADA Assistance Manual*, *supra* note 8, at 7026.

43. See MASS. GEN. LAWS ch. 152, § 75B(2) (1996). Section 75B(2) states that "[n]o employer or duly authorized agent of an employer shall discharge, refuse to hire or in any other manner discriminate against an employee because the employee has exercised a right afforded by [the worker's compensation laws]." *Id.*

44. See *Enforcement Guidance*, *supra* note 42, at 7192.

45. See MASS. GEN. LAWS ch. 151B, § 4(9A) (1996). Section 4(9A) provides the following:

No application for employment shall contain any questions or requests for information regarding the admission of an applicant, on one or more occasions, voluntarily or involuntarily, to any public or private facility for the care and treatment of mentally ill persons, provided that such applicant has been discharged from such public or private facility or facilities and is no longer under treatment directly related to such admission.

*Id.*

46. See *Enforcement Guidance*, *supra* note 42, at 7196. Nonetheless, questions regarding drug and alcohol use should generally be avoided due to their tendency to

In addition to questioning applicants, a number of employers require potential employees to undergo drug testing as part of the interviewing process.<sup>47</sup> Employers may require drug tests if the work to be performed is dangerous or if there are safety, liability, product control, or other concerns.<sup>48</sup> Although there are no Massachusetts cases addressing the issue, courts in other jurisdictions have held that an employer is not required to inform the applicant of test results if the applicant fails the preemployment drug screening.<sup>49</sup> Since there is no recognized duty to inform the applicant that he has failed a drug test, an employer's exposure to actions filed as a result of such a disclosure should be minimal.<sup>50</sup> In fact, the

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illicit information about a disability. *See id.*; *see also* Buckley v. Consolidated Edison Co., 127 F.3d 270, 272-74 (2d Cir. 1997) (discussing alcoholism and drug addiction and the circumstances under which each is a disability under the ADA).

47. *See generally* Webster v. Motorola, Inc., 418 Mass. 425, 637 N.E.2d 203 (1994); Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388, 630 N.E.2d 586 (1994); Guiney v. Police Comm'r, 411 Mass. 328, 582 N.E.2d 523 (1991); O'Connor v. Police Comm'r, 408 Mass. 324, 557 N.E.2d 1146 (1990); Horsemen's Benevolent & Protective Ass'n, Inc. v. State Racing Comm'n, 403 Mass. 692, 532 N.E.2d 644 (1989).

48. *See Folmsbee*, 417 Mass. at 393-94, 630 N.E.2d at 589-90 (holding that requiring employees to undergo drug testing was a legitimate business interest of the defendant which outweighed the plaintiff's rights to privacy when the plaintiff filed a suit alleging that the requirement of taking a drug test to maintain employment with the defendant violated the plaintiff's right to privacy under chapter 214, section 1(B) of the General Laws of Massachusetts); *see also Webster*, 418 Mass. at 431, 637 N.E.2d at 206-07.

49. *See Reeves v. Western Co. of N. Am.*, 867 S.W.2d 385, 388-91 (Tex. Ct. App. 1993), *abrogated on other grounds by* Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994). In *Reeves*, the plaintiff was a prospective employee who failed a drug test and was not hired on account of traces of alcohol found in his urine sample. *See id.* at 388. When a second drug test was conducted on the sample, the result was again positive for alcohol. *See id.* at 389. A letter from the laboratory which accompanied the results revealed that there could be two separate sources of the alcohol, either direct alcohol consumption or sugar which is broken into alcohol due to a health problem within the body. *See id.* The plaintiff was not notified of this second test, its results, or the accompanying letter. Thus, he was unable to explain that he had diabetic problems that most likely would account for the alcohol in his urine. *See id.* The plaintiff claimed that the defendant was negligent in the manner in which it secured, tested and/or reported the test results of the urine sample. *See id.* at 390. The plaintiff also claimed that the defendant intentionally inflicted emotional distress on the plaintiff's wife when she was told of the results of the test. *See id.* at 391. Because the court found that the employer did not owe a duty to the prospective employee, a judgment notwithstanding the verdict was affirmed. *See id.* at 391, 397.

50. *See Doe v. Roe, Inc.*, 553 N.Y.S.2d 364, 365 (N.Y. App. Div. 1990) (showing that disclosure of drug test results, however, may expose an employer to liability). In *Doe*, the employer made itself vulnerable to legal action by disclosing the results of a preemployment drug screening test to the plaintiff. *See id.* Bringing an action under the New York State Human Rights Laws, the plaintiff claimed that the metabolites found in his urine sample resulted from his consumption of bread which contained poppy seeds and not from unlawful opiate use. *See id.* The plaintiff alleged that the

Supreme Court of New York, Appellate Division, First Department, declared that only when the prospective employer is "challenged" must it come forward with evidence establishing that its testing method accurately tested that which it was designed to test.<sup>51</sup> Further, the New York court cautioned as follows:

While employers have broad discretion in setting hiring standards and administering tests to ensure that prospective employees meet those standards, the employer must show "that the standard or test bears a rational relationship to and is a valid predictor of employee job performance, and that it does not create an arbitrary, artificial and unnecessary barrier to employment which operates invidiously to discriminate on the basis of an impermissible classification."<sup>52</sup>

An employer's right to conduct drug or alcohol screening is based largely upon the employer's legitimate business interest so long as such tests are not used to achieve unlawful ends.

Once the interview stage is completed, and the prospective employee has fulfilled the preemployment requirements, the employer should then contemplate reducing its exposure to liability during the employment relationship itself. An employer can reduce its liability through several methods, which are discussed in the following sections.

#### IV. BEYOND THE INTERVIEW

##### A. *Posting Requirements*

Once an employer has hired employees, the employer must comply with various posting requirements. Notice of the following topics, which are available from appropriate federal and state agencies, must be posted in a conspicuous place where employees can readily see them: (i) equal employment opportunity;<sup>53</sup> (ii) job safety and health protections;<sup>54</sup> (iii) fair labor standards;<sup>55</sup> (iv) employee

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prospective employer did not use a testing method which would definitively distinguish the metabolites resulting from opiate use. *See id.*

51. *Id.*

52. *Id.* (quoting *Sontag v. Bronstein*, 303 N.E.2d 405, 407 (N.Y. 1973)).

53. *See* 29 C.F.R. § 1601.30 (1998) ("Every employer, employment agency, labor organization, and joint labor-management committee controlling an apprenticeship or other training program that has an obligation under Title VII or the ADA shall post and keep posted in conspicuous places upon its premises notices in an accessible format . . . describing the applicable provisions of Title VII and the ADA.").

54. *See* 29 U.S.C. § 657(c)(1) (1994) (noting that the Secretary will "issue regulations requiring that employers, through posting of notices or other means, keep their

polygraph protection;<sup>56</sup> and family and medical leave rights.<sup>57</sup>

Beyond merely complying with these posting requirements, employers can limit their potential liability through the use of written agreements that delineate the employment relationship.

## B. *Employment Agreements that Protect Employers*

### 1. Non-Competition Agreements

Employment agreements often provide significant opportunities for employers to protect business assets, including good will, trade secrets, and intellectual property.<sup>58</sup> If an employer fails to draft an employment agreement, an employee can “plan to go into competition with his employer and may take active steps to do so while still employed.”<sup>59</sup> Regardless of the existence of an employ-

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employees informed of their protections and obligations under this chapter, including the provisions of applicable standards”); *see also* 29 C.F.R. § 1903.2(a)(1) (1998) (“Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the [Occupational Safety and Health Act, 29 U.S.C. §§ 651-678,] and that for assistance information . . . employees should contact the employer or the nearest Office of the Department of Labor. Such notices shall be posted by the employer in each establishment in conspicuous place or places where notices to employees are customarily posted.”).

55. *See* 29 C.F.R. § 516.4 (1998) (“Every employer employing any employee subject to the . . . minimum wage provisions [of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219,] shall post and keep posted a notice explaining the Act . . . in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy.”).

56. *See id.* § 801.6 (“Every employer subject to [the Employee Polygraph Protection Act, 29 U.S.C. §§ 2001-2009,] shall post and keep posted on its premises a notice explaining the Act, as prescribed by the Secretary. Such notice must be posted in a prominent and conspicuous place in every establishment of the employer where it can readily be observed by employees and applicants for employment.”); *see also* 29 U.S.C. § 2003 (“Each employer shall post and maintain such notice in a conspicuous place on its premises where notices to employees and applicants to employment are customarily posted.”); MASS. GEN. LAWS ch. 149, § 19B (1996).

57. *See* 29 C.F.R. § 825.300 (1998) (“Every employer covered by the [Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654,] is required to post on its premises, in conspicuous places where employees are employed, whether or not it has any ‘eligible’ employees, a notice explaining the Act’s provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment.”); *see also* 29 U.S.C. § 2619 (1994); MASS. GEN. LAWS ch. 149, § 105D (1996).

58. *See Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 172-73, 565 N.E.2d 415, 419-20 (1991).

59. *Id.* at 172, 565 N.E.2d at 419. In *Augat*, the defendant was a former employee and future competitor of the plaintiff corporation. *See id.* at 166, 565 N.E.2d at 416. While in the plaintiff’s employ, the individual defendant signed an agreement not to

ment agreement, however, an employee may not appropriate his employer's trade secrets. He may not solicit his employer's customers while still working for his employer, and he may not carry away certain information, such as lists of customers. In addition, such a person may not act for his future interests at the expense of his employer by using the employer's funds or employees for personal gain or by a course of conduct designed to hurt the employer.<sup>60</sup> Nonetheless, a restrictive covenant may be used to expand upon the protections afforded to an employer. It should be noted, however, that where a restrictive covenant not to compete interferes with the former employee's right to earn a living, the covenant will not be enforceable.<sup>61</sup>

In Massachusetts, non-competition agreements are generally enforced if they are deemed necessary to protect legitimate business interests, and if the language of the covenant "is reasonably limited in time and space, and is consonant with the public interest."<sup>62</sup> If a court finds that a non-competition covenant is over-

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compete. One month after that agreement expired, he made plans to form the defendant corporation while he and a current employee of the plaintiff corporation took actions to recruit key managers of the plaintiff corporation. *See id.* The court decided that while it is permissible to plan and take active steps to go into competition with an employer, "before he terminates his employment, a top managerial employee may not solicit the departure of employees to work for a competitor." *Id.* at 173, 565 N.E.2d at 420.

60. *See id.* at 172-73, 565 N.E.2d at 419-20.

61. *See Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 357 Mass. 106, 109-11, 256 N.E.2d 304, 306-08 (1970). In *Richmond Brothers*, the plaintiff, a broadcast company sued its former employee, a radio talk show personality, alleging that the defendant breached his covenant not to compete by working for a competing radio station. The court stated the following:

In determining whether a restriction as to time is reasonable, we must consider the nature of the plaintiff's business and the character of the employment involved, as well as the situation of the parties, the necessity of the restriction for the protection of the employer's business and the right of the employee to work and earn a livelihood.

*Id.* at 110, 256 N.E.2d at 307. The court further noted the following:

"[A]n employer cannot by contract prevent his employee from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of the employment. The employee may achieve superiority in his particular department by every lawful means at hand, and then, upon the rightful termination of his contract for service, use that superiority for the benefit of rivals in trade of his former employer."

*Id.* at 111, 256 N.E.2d at 307 (quoting *Club Aluminum Co. v. Young*, 263 Mass. 223, 226-27, 160 N.E.2d 804, 806 (1928)).

62. *Novelty Bias Binding Co. v. Shevrin*, 342 Mass. 714, 716, 175 N.E.2d 374, 376 (1961); *see also Analogic Corp. v. Data Translation, Inc.*, 371 Mass. 643, 647, 358 N.E.2d 804, 807 (1976). In *Analogic*, the plaintiff corporation employed two of the individual defendants during the development of an unpatented, high speed data acquisition mod-

broad, the court may limit enforcement to a more appropriate time and space.<sup>63</sup> Note however, in Massachusetts, non-competition agreements between physicians are unenforceable.<sup>64</sup>

Furthermore, it is firmly established in Massachusetts law that when a court is determining "whether a covenant will be enforced, in whole or in part, the reasonable needs of the former employer for protection against harmful conduct of the former employee must be weighed against both the reasonableness of the restraint imposed on the former employee and the public interest."<sup>65</sup> When

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ule. *See id.* at 645, 358 N.E.2d at 805. Development took some eighteen months and over \$100,000 in funds. *See id.*, 358 N.E.2d at 806. Once the module was developed, the two individual defendants were released from their duties at Analogic. At the time of their departure, the two individuals signed statements indicating that they would not take with them any documents or any materials belonging to Analogic. *See id.*, 358 N.E.2d at 806. Shortly thereafter, the two individuals, and others, formed the defendant corporation for the purpose of creating a data acquisition module similar in all respects to that of plaintiff's Module "MP 6912." The defendants used documents, drawings, and a sample of the plaintiff's module to create, in just a few months and at a cost of approximately \$2,500, a copy of the MP 6912. *See id.*, 358 N.E.2d at 806. The court determined that an injunction could be issued against the defendants and that the time period for which it would be effective would be based upon the reasonableness of its scope, *i.e.*, the length of time it would normally take for skilled engineers to duplicate the product once it has been offered to the general public. *See id.* at 647, 358 N.E.2d at 808.

63. *See All Stainless, Inc. v. Colby*, 364 Mass. 773, 777-78, 308 N.E.2d 481, 485 (1974) (enforcing a two-year non-competition agreement, but reducing the geographic area to prior sales territory).

64. Chapter 112, section 12X of the General Laws of Massachusetts provides the following:

Any contract or agreement which creates or establishes the terms of a partnership, employment, or any other form of professional relationship with a physician registered to practice medicine pursuant to section two, which includes any restriction of the right of such physician to practice medicine in any geographic area for any period of time after the termination of such partnership, employment or professional relationship shall be void and unenforceable with respect to said restriction; provided, however, that nothing herein shall render void or unenforceable the remaining provisions of any such contract or agreement.

MASS. GEN. LAWS ch. 112, § 12X (1996); *see also Falmouth Ob-Gyn Assocs. v. Abisla*, 417 Mass. 176, 179-80, 629 N.E.2d 291, 293 (1994) (interpreting statute as unenforceable due to its compensation for competition clause as a restriction on employment).

65. *All Stainless*, 364 Mass. at 778, 308 N.E.2d at 485; *accord Richmond Bros.*, 357 Mass. at 110, 256 N.E.2d at 307; *Cedric G. Chase Photo. Lab., Inc. v. Hennessey*, 327 Mass. 137, 139, 97 N.E.2d 397, 398-99 (1951); *Economy Grocery Stores Corp. v. McMenamy*, 290 Mass. 549, 553, 195 N.E. 747, 748 (1935); *Walker Coal & Ice Co. v. Westerman*, 263 Mass. 235, 238, 160 N.E. 801, 802 (1928); *see also* RESTATEMENT OF CONTRACTS §§ 515-516 (1932); 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1394 (1962); Annotation, *Enforceability of Restrictive Covenant, Ancillary to Employment Contract, as Affected by Territorial Extent of Restriction*, 43 A.L.R.2d 94, 116 (1955).



the covenant is too encompassing in time, in area, or in any other respect, only those portions that can be severed and are reasonable will be enforced.<sup>66</sup> Finally, an employer cannot use an employment contract to restrain "ordinary competition," which occurs when an employee is rightfully terminated and takes the expertise of the trade acquired while working for the former employer and applies these skills for the benefit of a new employer, often a rival in the trade of the former employer.<sup>67</sup>

When an employer terminates employment in contravention of the employment contract, any restrictive covenants included in the contract cannot be enforced.<sup>68</sup> The issue of whether restrictive covenants included in a wrongfully terminated employment contract may be enforced was raised in *Ward v. American Mutual Liability Insurance Co.*<sup>69</sup> In *Ward*, the plaintiffs signed a written employment contract which provided that termination could only occur on the anniversary of employment.<sup>70</sup> When the defendant required employees to sign a new contract after ten years of service or be terminated, the plaintiffs refused to sign and were subsequently terminated.<sup>71</sup> The terminated employees filed suit against American Mutual for breach of the employment contract.<sup>72</sup> In response, American Mutual asserted that the plaintiffs violated the non-competition clause of the contract, which provided "that the employee, for a period of eighteen months following termination of employment, would not procure, solicit, accept or refer applications or inquiries about insurance from persons insured by the defendant . . . under a policy sold or serviced by the employee."<sup>73</sup> The court held for the plaintiffs because, applying contract principles, the breach terminated the non-competition obligations of the contract.<sup>74</sup>

Thus, an employer may protect its interests through the use of a restrictive covenant, so long as that employer does not terminate the employee in contravention of the employment contract. Simi-

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66. See *All Stainless*, 364 Mass. at 778, 308 N.E.2d at 485.

67. See *Club Aluminum Co. v. Young*, 263 Mass. 223, 226-27, 160 N.E. 804, 806 (1928) ("[A]n employer cannot by contract prevent his employee from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of the employment.").

68. See *Ward v. American Mut. Liab. Ins. Co.*, 15 Mass. App. Ct. 98, 101, 443 N.E.2d 1342, 1344 (1983).

69. 15 Mass. App. Ct. 98, 443 N.E.2d 1342 (1983).

70. See *id.* at 99, 443 N.E.2d at 1343.

71. See *id.*, 443 N.E.2d at 1342-43.

72. See *id.* at 98, 443 N.E.2d at 1342.

73. *Id.* at 99, 443 N.E.2d at 1342.

74. See *id.* at 101, 443 N.E.2d at 1344.

larly, although not necessarily required, an employer may protect its interests in trade secrets through the use of an express agreement.

## 2. Protecting Trade Secrets

A trade secret is defined as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."<sup>75</sup> In *Jet Spray Cooler, Inc. v. Crampton*,<sup>76</sup> the Massachusetts Supreme Judicial Court adopted the six factor test set forth in the Restatement of Torts for defining the term trade secret.<sup>77</sup> Therefore, when determining whether a piece of information qualifies as a trade secret, a court in Massachusetts must consider the following factors:

(1) the extent to which the information is known outside of the business, (2) the extent to which it is known by employees and others involved in the business, (3) the extent of measures taken by the employer to guard the secrecy of the information, (4) the value of the information to the employer and to his competitors, (5) the amount of effort or money expended by the employer in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>78</sup>

If a piece of information is found to be a trade secret, it may not be disclosed by the employee, even in the absence of an express agreement.<sup>79</sup> Nevertheless, in order to protect its trade secrets and

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75. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995). There has been an effort made to use a uniform trade secret law. See UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 433 (1990). The uniform act defines a trade secret as information, including formula, pattern, compilation, program, device, method, technique, or process that: (i) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 433 (1990). However, this Act has not been adopted in Massachusetts.

76. 361 Mass. 835, 282 N.E.2d 921 (1972).

77. See *id.* at 840, 282 N.E.2d at 925.

78. *Id.* at 840, 282 N.E.2d at 925.

79. See MASS. GEN. LAWS ch. 93, § 42 (1996). Section 42 reads as follows:

Whoever embezzles, steals or unlawfully takes, carries away, conceals, or copies, or by fraud or by deception obtains, from any person or corporation, with intent to convert to his own use, any trade secret, regardless of value, shall be

other confidential information, the employer's best course of action is to define an employee's obligation to maintain confidences and secrets of the employer through the use of a written agreement.<sup>80</sup>

### 3. Protecting Patents and Copyrights

Similarly, the "shop right" doctrine allows employers to use patents and copyrights that were developed by employees while using the employer's resources.<sup>81</sup> However, if the employer desires absolute ownership in the patent(s), an express agreement to that effect must be signed by the employee-inventor.<sup>82</sup> Otherwise, the employer is merely accorded a non-exclusive right to practice the invention once a patent is obtained by the employee, and the employer is not entitled to a conveyance of the invention.<sup>83</sup> Historically, "such agreements have been construed somewhat strictly against the employer,"<sup>84</sup> therefore, an employer must use caution when drafting this type of agreement. Once again, the conservative approach, as part of an employment agreement, is to include specific terms making the employer the owner of patents and copyrights created in the course of employment and thereby preventing disagreement and litigation in the future. Unfortunately, even if employers follow the suggestions put forth in this Article, problems may still arise within the employment relationship. In the event of disagreements between the employer and the employee, an arbitra-

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liable in tort to such person or corporation for all damages resulting therefrom.

*Id.*; see also *Eastern Marble Prods. Corp. v. Roman Marble, Inc.*, 372 Mass. 835, 841, 364 N.E.2d 799, 803 (1977) ("It is settled by our cases that the duty of an employee not to disclose confidential information is grounded on 'basic principles of equity' . . . and upon an implied contract, growing out of the nature of the employer-employee relation.").

80. See *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 172, 565 N.E.2d 415, 419 (1991) ("If an employer wishes to restrict the post-employment competitive activities of a key employee, it may seek that goal through a non-competition agreement.").

81. The "shop right" rule is defined as follows: "In patent law, the right of an employer to use employee's invention in employer's business without payment of royalty." BLACK'S LAW DICTIONARY 961 (6th ed. 1990).

82. See *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U.S. 315, 320 (1893); see also *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 202, 84 N.E. 133, 135 (1908).

83. See *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 189 (1933); see also *American Circular*, 198 Mass. at 202, 84 N.E. at 135.

84. *American Circular*, 198 Mass. at 202, 84 N.E. at 136; see also *Hildreth v. Duff*, 143 F. 139, 140 (C.C.W.D. Pa. 1906) ("The terms of [such a contract] should be so precise as that neither party could reasonably misunderstand them." (quoting *Colson v. Thompson*, 15 U.S. (2 Wheat) 336, 341 (1817))).

tion clause that was initially set forth in the employment agreement would serve to protect the employer's interests.

#### 4. Arbitration

An important section of an employment agreement, for purposes of protecting the employer, is a clause requiring that all employment-related disputes be arbitrated. The Federal Arbitration Act, enacted in 1925, then reenacted and codified in 1947 as Title 9 of the United States Code, governs the arbitration process and procedures.<sup>85</sup> "Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts and to place arbitration agreements upon the same footing as other contracts."<sup>86</sup> Further, 9 U.S.C. § 3 grants stays of proceedings in federal district courts when an issue in the proceeding should be arbitrated.<sup>87</sup> Section 4 of Title 9 provides "for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement."<sup>88</sup> "These provisions manifest a 'liberal federal policy favoring arbitration agreements.'"<sup>89</sup>

In Massachusetts, it is preferable for employers to resolve claims through arbitration, especially in the context of discrimination claims, which allow employees to seek unlimited damages before a jury.<sup>90</sup> Fortunately for employers, the trend in Massachusetts is to favor enforceability of arbitration agreements. In *Mugnano-Bornstein v. Crowell*,<sup>91</sup> the plaintiff signed an arbitration agreement as part of her employment contract.<sup>92</sup> She was later terminated for insubordination and subsequently filed a complaint in superior court alleging sexual harassment and gender discrimination.<sup>93</sup> The defendants filed a motion to stay court proceedings and to compel enforcement of the arbitration agreement, which the

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85. Act of July 30, 1947, ch. 392, § 1, 61 Stat. 669 (codified as amended at 9 U.S.C. §§ 1-307 (1994)); see also Massachusetts Arbitration Act, MASS. GEN. LAWS ch. 251, §§ 1-19 (1996).

86. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); see also *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20, 220 n.6 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 & n.4 (1974).

87. See 9 U.S.C. § 3; see also *Gilmer*, 500 U.S. at 25.

88. *Gilmer*, 500 U.S. at 25; see also 9 U.S.C. § 4.

89. *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

90. See MASS. GEN. LAWS ch. 151B, § 5 (1996).

91. 42 Mass. App. Ct. 347, 677 N.E.2d 242 (1997).

92. See *id.* at 348, 677 N.E.2d at 244.

93. See *id.*, 677 N.E.2d at 244.

court granted.<sup>94</sup> At the arbitration hearing, the plaintiff's claims were unanimously denied and dismissed.<sup>95</sup> The plaintiff petitioned the court to revoke the stay and in response the defendants requested enforcement of the arbitration findings.<sup>96</sup> The superior court, citing a case decided by the United States Court of Appeals for the Ninth Circuit, reversed the stay and found that the plaintiff did not knowingly waive her rights to a jury trial.<sup>97</sup> However, on appeal, the Massachusetts Supreme Judicial Court held that the arbitration agreement was binding and that the plaintiff had waived all claims, including discrimination claims.<sup>98</sup> The Supreme Judicial Court refused to adopt the "knowing waiver" requirement of the Ninth Circuit, thus recognizing the enforceability of arbitration agreements.<sup>99</sup>

Language that compels employees to arbitrate all employment disputes has become more popular in recent years. The leading case in this area is *Gilmer v. Interstate/Johnson Lane Corporation*.<sup>100</sup> In *Gilmer*, the defendant hired the plaintiff as a "Manager of Financial Services" in May of 1981.<sup>101</sup> The plaintiff was required, as a condition of his employment, to register as a securities representative with several stock exchanges, including the New York Stock Exchange ("NYSE").<sup>102</sup> In 1987, at the age of 62, the plaintiff was released from his job. He claimed the release was age related.<sup>103</sup> When the plaintiff initiated proceedings against his former employer in the United States District Court for the Western Division of North Carolina, under the Age Discrimination in Employ-

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94. See *id.*, 677 N.E.2d at 244.

95. See *id.* at 349, 677 N.E.2d at 244.

96. See *id.*, 677 N.E.2d at 244.

97. See *id.*, 677 N.E.2d at 244 (citing *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994)). Although *Prudential Insurance* was

decided after the original order compelling arbitration, the judge ruled that "an employee must knowingly agree to arbitrate discrimination claims under G.L. c. 151B in order to waive her right to trial," and that the plaintiff "could not have known that she was waiving her statutory right to a trial on her sexual harassment and discrimination claims" when she signed the application for employment containing the arbitration agreement.

*Id.*, 677 N.E.2d at 244 (quoting *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994)).

98. See *id.* at 353, 677 N.E.2d at 247.

99. See *id.* at 352, 677 N.E.2d at 246.

100. 500 U.S. 20 (1991).

101. *Id.* at 23.

102. See *id.*

103. See *id.*

ment Act of 1967 ("ADEA"),<sup>104</sup> the defendant filed a motion to compel arbitration based on a provision of the application completed for the NYSE.<sup>105</sup> The relevant application provision required arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."<sup>106</sup>

The majority opinion in *Gilmer* recognized that there may be an inequality in bargaining power when parties enter into an employment contract.<sup>107</sup> The Court decided, however, that this inequality is "not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."<sup>108</sup> Thus, an employer can ensure the enforceability of an arbitration provision by confirming that the clause providing for arbitration reaches all the areas intended to be subject to arbitration.<sup>109</sup>

Justice Stevens, joined by Justice Marshall, filed a dissenting opinion in the *Gilmer* case.<sup>110</sup> In his dissent, Justice Stevens declared that the Court's majority opinion barely touched upon the antecedent issue of "whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue."<sup>111</sup> Justice Stevens detailed portions of the history of the Federal Arbitration Act and also quoted the chairman of the American Bar Association committee that was responsible for drafting the bill.<sup>112</sup> The chairman had assured the Senators by stating that the bill "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do

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104. 29 U.S.C. §§ 621-634 (1994).

105. See *Gilmer*, 500 U.S. at 24.

106. *Id.* at 23.

107. See *id.* at 33.

108. *Id.*

109. See *Spear, Leeds & Kellogg v. Central Life Assur. Co.*, 85 F.3d 21, 28 (2d Cir. 1996) (providing that the strong federal policy favoring arbitration will only extend its reach into scopes of arbitration which are written into individual agreements). In addition, some jurisdictions may require arbitration, even where the agreement does not specifically call for it. See *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989) ("Indeed, the heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.").

110. *Gilmer*, 500 U.S. at 36 (Stevens, J., dissenting).

111. *Id.* (Stevens, J., dissenting).

112. See *id.* at 39 (Stevens, J., dissenting).

it.”<sup>113</sup> While it is true that merchants have the right and privilege of sitting down and bargaining on equal footing, there is a definite inequality of bargaining power between an employer and a potential employee. The employer lays down the offer and the terms of the employment agreement; the potential employee has no choice but to accept the terms of the agreement or surrender the opportunity to work. Therefore, employment contracts are not entered into on equal bargaining terms, and the employee may be forced to give up his or her right to have the case litigated by a court.<sup>114</sup> Nonetheless, the majority view of the Supreme Court is that the unequal bargaining positions of those entering into employment contracts does not render arbitration agreements *per se* unenforceable.<sup>115</sup>

#### V. EMPLOYMENT MANUALS AND POLICIES AND THEIR EFFECT ON THE GENERAL RULE OF AT-WILL EMPLOYMENT

Absent contractual terms to the contrary, the general rule in Massachusetts is that employees are presumed to be employed at-will, and thus that the employment relationship can be terminated by either party at any time.<sup>116</sup> As a result, in any written statements regarding the employment relationship, there should be no references to “permanent employees” or any other use of the word “permanent.” The word “permanent” should be replaced with the word “regular” in an attempt to avoid the inference of employment for life.<sup>117</sup>

When dealing with an at-will employment relationship, it is not generally necessary that an employer have “good cause” to dis-

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113. *Id.* (Stevens, J., dissenting) (quoting *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong. 9 (1923)).

114. *See id.* (Stevens, J., dissenting).

115. *See id.* at 33.

116. *See Jackson v. Boston Community Dev., Inc.*, 403 Mass. 8, 9, 525 N.E.2d 411, 412 (1988) (“As a general rule, where an employment contract . . . contains no definite period of employment, it establishes employment at will.”); *see also Upton v. Businessland*, 425 Mass. 756, 757, 682 N.E.2d 1357, 1358 (1997) (“The general rule is that an at-will employee may be terminated at any time for any reason or for no reason at all.”).

117. In addition, employers should avoid references to fixed periods of time, such as annual salaries or specific examples of times for discipline or suspension because these may impose additional burdens on the employer. Similarly, references to a “probationary period” should be changed to “nonregular” with respect to reasons for discipline or termination because at the end of a “probationary period,” an employee could reasonably argue that they should be considered “permanent” and entitled to lifetime employment.

charge an employee.<sup>118</sup> Only when the discharge of an at-will employee is against public policy does a claim for breach of a covenant of good faith and fair dealing arise.<sup>119</sup> The following are examples of discharges of an employee that were found to be against public policy. In *Montalvo v. Zamora*,<sup>120</sup> an employer discharged an employee because the employee hired an attorney to negotiate his claim that the employer violated the minimum wage law.<sup>121</sup> In *Petermann v. International Brotherhood of Teamsters, Chauffeurs, Warehouseman & Helpers, Local 396*,<sup>122</sup> an employee was discharged for refusing to commit perjury before a government commission.<sup>123</sup> In *Frampton v. Central Indiana Gas Co.*,<sup>124</sup> the plaintiff was discharged for filing a worker's compensation claim.<sup>125</sup> Aside from at-will terminations that are against public policy, like those mentioned above, it appears that in at-will employment relationships involving commissions, employers can only terminate employees entitled to commissions for good faith reasons.<sup>126</sup>

In determining whether an employment contract is for a specific duration such that the inference of "at-will" employment is re-

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118. See *Cort v. Bristol-Myers Co.*, 385 Mass. 300, 303, 431 N.E.2d 908, 910 (1982) (citing *Gram v. Liberty Mut. Ins. Co.*, 384 Mass. 659, 429 N.E.2d 21 (1981)).

119. See *id.*, 431 N.E.2d at 910.

120. 86 Cal. Rptr. 401 (Cal. Ct. App. 1970).

121. See *id.* at 402.

122. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

123. See *id.* at 27-28.

124. 297 N.E.2d 425 (Ind. 1973).

125. See *id.* at 426.

126. See *RLM Assocs., Inc. v. Carter Mfg. Corp.*, 356 Mass. 718, 248 N.E.2d 646 (1969); see also *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977). In *RLM Associates*, Carter, the employer, fired its representative, RLM, shortly before Carter was awarded a contract which was discovered and brought to its attention by RLM. See *RLM Assocs.*, 356 Mass. at 718, 248 N.E.2d at 646. The awarding of the contract would have required Carter to pay a commission to RLM. See *id.*, 248 N.E.2d at 646.

In *Fortune*, a cash register salesman was discharged by his employer shortly after he completed a sale worth \$5,000,000, of which he was to receive a contractual bonus of \$92,079. See *Fortune*, 373 Mass. at 98-99, 364 N.E.2d at 1254. Fortune only received 75% of the bonus due on the sale and the remaining 25% of the bonus was paid to a systems and installations person, contrary to the company's usual policy of paying only the salesperson a bonus. See *id.* at 99, 364 N.E.2d at 1254. The court decided that "where the principal seeks to deprive the agent of all compensation by terminating the contractual relationship when the agent is on the brink of successfully completing the sale, the principal has acted in bad faith and the ensuing transaction between the principal and the buyer is to be regarded as having been accomplished by the agent." *Id.* at 104-05, 364 N.E.2d at 1257. The court then added that "the same result obtains where the principal attempts to deprive the agent of any portion of a commission due the agent." *Id.*, 364 N.E.2d at 1257.



butted, courts will evaluate the actual language of the contract and various other employment related documents as well as the circumstances that existed between the parties when said documents were executed.

A. *Determining Whether a Contract Is for a Specific Term*

In *Frederick v. Conagra, Inc.*,<sup>127</sup> the court found that whether certain documents amounted to a contract of employment for a specific term was an issue of fact that must be resolved at trial.<sup>128</sup> In *Frederick*, the United States District Court for the District of Massachusetts held that a letter confirming an annual salary and indicating that the employer agreed to cancel a loan after two years of employment was sufficient for the jury to find that a two-year employment contract existed.<sup>129</sup>

In a similar case, *Kravetz v. Merchants Distributors, Inc.*,<sup>130</sup> the Massachusetts Supreme Judicial Court held that a motion for a directed verdict was improper because the jury could have found that a contract was for a specific term and was not terminable at-will.<sup>131</sup> The court stated that "[w]hether there is a contract for services for a definite period of time . . . depends upon all the attendant conditions surrounding the agreement, as well as upon its terms, when the latter are not specific and clear."<sup>132</sup> When an employment contract is unclear in terms of the duration of employment "it [is] proper for the jury to refer not only to the contract language but also to the attendant circumstances, including 'the nature of the employment, . . . the prior negotiation[s], [and] the situation of the

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127. 713 F. Supp. 41 (D. Mass 1989).

128. See *id.* at 46. In *Frederick*, the employer offered a position to the plaintiff with an oral representation that Frederick was being hired for at least two years. See *id.* at 43. An employment contract was never signed, and less than three months after the plaintiff began working for the defendant, after the plaintiff had relocated his family from Buffalo, New York to Massachusetts, he was fired on thirty days notice for no stated cause. See *id.* The plaintiff brought a claim for breach of employment contract based not on a written employment agreement but on various representations and negotiations between the parties which induced Frederick to leave his former job and join the employer's company. See *id.* at 44-45. Such representations and negotiations were found by the court to be questions of material fact, which were genuinely in dispute when determining whether an agreement for employment for a specific term had existed. See *id.* at 46.

129. See *id.*

130. 387 Mass. 457, 440 N.E.2d 1278 (1982).

131. See *id.* at 460, 440 N.E.2d at 1280.

132. *Id.*, 440 N.E.2d at 1280 (alteration in original) (quoting *Maynard v. Royal Worcester Corset Co.*, 200 Mass. 1, 4, 85 N.E. 877, 878 (1908)).

parties.”<sup>133</sup>

B. *Determining Whether Handbooks Create an Express or Implied Contract*

Employers must use caution in drafting employee handbooks, as certain language may alter the presumption of at-will employment. In determining whether an employee handbook constitutes an employment contract, Massachusetts courts have looked at the following factors which are collectively known as the *Jackson* test: (i) whether the employer retained the right to unilaterally change the employment manual; (ii) whether the employee ever negotiated any of the terms; (iii) whether a specific term of employment was stated in the manual; (iv) whether the employee signed the manual or manifested his assent to it or acknowledged that he understood its terms; (v) whether any special attention was given the manual by the employer; and (vi) whether the manual was merely intended to provide guidance or actual obligations.<sup>134</sup>

Recent Massachusetts cases have relied on the *Jackson* test when determining whether a handbook created contractual terms. For example, in *Biggins v. Hazen Paper Co.*,<sup>135</sup> the court held that the absence of two elements of the *Jackson* test was fatal for the plaintiff.<sup>136</sup> The plaintiff argued that the employment handbook created an express contract, and in the alternative, an implied contract.<sup>137</sup> The plaintiff had been terminated and wanted to receive payment for his accrued vacation time which he was entitled to pursuant to a provision in the employee handbook.<sup>138</sup> The court held that since the plaintiff had no opportunity to negotiate the terms of the handbook and no special attention was given to the handbook

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133. *Id.*, 440 N.E.2d at 1280 (alterations in original) (quoting *Mahoney v. Hildreth & Rogers Co.*, 332 Mass. 496, 498, 125 N.E.2d 788, 790 (1955)).

134. *See Jackson v. Action for Boston Community Dev., Inc.*, 403 Mass. 8, 525 N.E.2d 411 (1988). In *Jackson*, the employee contended that he entered into an employment contract with his employer based on terms which were established by a “Personnel Policies Manual” distributed by the employer. *Id.* at 8, 525 N.E.2d at 412. The plaintiff alleged that the defendant breached this employment contract by discharging him in a manner which did not comport with the grievance procedure outlined in the personnel manual. The court considered several factors in reaching a decision that the conduct and relation of the parties “fell short of that which would allow a jury to decide reasonably that the parties had entered an implied contract based on the manual’s terms.” *Id.* at 15, 525 N.E.2d at 416.

135. 953 F.2d 1405 (1st Cir. 1992), *vacated on other grounds*, 507 U.S. 604 (1993).

136. *See id.* at 1423-24.

137. *See id.* at 1422.

138. *See id.*

by the employer, there was neither an express nor an implied contract, and therefore, no breach existed.<sup>139</sup> Likewise, in *Mullen v. Ludlow Hospital*,<sup>140</sup> the court held that an employment manual did not create an employment contract and that the plaintiff was, accordingly, an at-will employee.<sup>141</sup> The court reasoned as follows:

There was no agreement, written or oral, specifying a definite period of employment. While there was an employment manual, it did not form the basis of a contract because the plaintiff did not negotiate its terms and received it only after he began working. In addition, the manual, by its own terms, declared [that] it was not a contract and that the Hospital could change the terms unilaterally.<sup>142</sup>

The cases on this point seem to favor the employer in that a plaintiff arguing that an employment manual forms the basis of a contract will be required to meet all factors of the *Jackson* test in order to prevail.

### C. *The Effect of Disclaimers in Employment Manuals*

Finally, in order to strengthen an employer's argument that a handbook does not form the basis of a contract, the employment handbook should contain a strong contract disclaimer.<sup>143</sup> Disclaimers run the gamut from simple one sentence references that the handbook is not a contract and that all employment is at-will to the much more detailed. The following is an example of a detailed disclaimer:

The policies stated in this Handbook are intended as guidelines only and are subject to change at the sole discretion of the Company. This Handbook should not be construed as and does not constitute a contract guaranteeing employment for any specific duration. Although we hope that your employment relationship with us is long-term, either you or the Company may terminate this relationship at any time, for any reason, with or without cause or notice. Please understand that no supervisor, manager, or representative of XYZ other than the [e.g., President], has the authority to enter into any agreement with you for

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139. See *id.* at 1423.

140. 32 Mass. App. Ct. 968, 592 N.E.2d 1342 (1992).

141. See *id.* at 969, 592 N.E.2d at 1344.

142. *Id.*, 592 N.E.2d at 1344 (citation omitted).

143. See *id.*, 592 N.E.2d at 1344 (noting that a disclaimer within the employment manual, which provided that the manual was not a contract, was a factor in the courts determination of at-will employment).

employment for any specified period of time or to make any promises or commitments contrary to the foregoing. Further, any employment agreement entered into by the [e.g., President] shall not be enforceable unless it is in writing.<sup>144</sup>

When an employer uses a detailed disclaimer, including language equivalent to that quoted above, little room is left for the employee to argue that the employment relationship is anything other than at-will. Thus, the employer's risk that a court will rule that an employment contract existed and attribute to the employer additional, unforeseen obligations in the employment relationship is thereby reduced. For example, in *Seeley v. Prime Computer, Inc.*,<sup>145</sup> when the plaintiff argued that the employment manual created a contract, the Massachusetts Appeals Court disagreed and held that the employment manual in question did not create a contract due to an express disclaimer contained therein.<sup>146</sup>

In *Seeley*, the plaintiff took a leave of absence due to a mental disability and received payments from the defendant.<sup>147</sup> After several months, the defendant required the plaintiff to undergo another psychological examination to determine if she could return to work.<sup>148</sup> The defendant felt that the plaintiff was able to come back to work, but the plaintiff refused to take the same job she had prior to her leave of absence.<sup>149</sup> The defendant subsequently terminated her employment. The plaintiff sued for breach of contract relying on the employment manual's clause "which included, in its terms and conditions, both short and long term disability benefits."<sup>150</sup> The court reasoned that the employment manual did not constitute a contract:

The Employee Handbook upon which Mrs. Seeley relies contains a disclaimer on page one which clearly states that the Handbook cannot be construed as a contract between Prime and its employees; that the policies and procedures set forth do not constitute conditions of employment; and that Prime reserved the right unilaterally to "modify, revoke, suspend, terminate or change any or all such plans, policies or procedures in whole or in part at any

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144. ROBERT J. NOBILE, GUIDE TO EMPLOYEE HANDBOOKS § 3.06[2] (1992 ed.).

145. 1990 Mass. App. Div. 132 (1990).

146. *See id.* at 134.

147. *See id.* at 132.

148. *See id.* at 133.

149. *See id.*

150. *Id.*

time without notice."<sup>151</sup>

Although most employment manuals contain disclaimer language providing that the manual does not constitute a contract, problems still arise when the employment manual requires the employer to follow established guidelines in order to discipline or terminate employees.<sup>152</sup> "[I]n certain limited situations, an employer's discharge of an at-will employee may give rise to a cause of action for wrongful discharge such as where the at-will status of the employee is altered by the terms of an employee handbook . . . ."<sup>153</sup> When the employer is found to be liable for breach of an at-will employment contract based on violations of an employee handbook, the employee is entitled to back pay and reinstatement to his or her former employment position.<sup>154</sup>

#### D. *The Effect of Severance and Reemployment Right Clauses in Employment Manuals*

An employer may encounter problems if it chooses to describe severance and reemployment rights in its employment manual.<sup>155</sup>

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151. *Id.* at 134.

152. *See generally* Small v. Springs Indus., Inc., 388 S.E.2d 808 (S.C. 1990). Small was employed as a spinner by Springs for a period of eight years. *See id.* at 810. During Small's employment, Springs utilized an employee handbook which set out a four step procedure for discharging employees. *See id.* Small was not discharged in accordance with the handbook's four step procedure and filed her action for breach of contract, claiming that her at-will employment status was altered by the provisions of the employee handbook. *See id.*

153. *Id.* (citing Small v. Springs Indus., Inc., 357 S.E.2d 452 (S.C. 1987)).

154. *See id.* at 814 (Littlejohn, J., concurring and dissenting).

155. *See generally* Dahl v. Brunswick Corp., 356 A.2d 221 (Md. 1976). Brunswick had both written and unwritten policies and practices which were followed regarding severance and vacation pay. *See id.* at 223. An unwritten practice which Brunswick followed regarding entitlement to severance pay was that two weeks' salary would be paid to an employee if they were not given two weeks' prior notice of termination. *See id.* On September 17, 1971, Brunswick agreed to sell its Concorde Yacht Division to Test Corporation. As part of the agreement, Brunswick was not able to induce or to recruit personnel of the Concorde Division to remain in the employ of Brunswick. Further, Test Corporation was required to continue Brunswick's policies with respect to severance and vacation pay. *See id.* at 224. The plaintiffs accepted positions with Test Corporation and were paid the same salaries that they received from Brunswick. Test Corporation also continued Brunswick's policies with respect to severance pay, vacation pay, and two weeks pay in lieu of prior notice of termination. *See id.* However, on April 27, 1972, Test Corporation closed its doors on account of insolvency. After Test Corporation closed its doors, the plaintiffs filed suit to recover lost compensation from Brunswick. *See id.* The trial court found that the plaintiffs were entitled to severance pay based on the meaning of the policy statement, but that the plaintiffs were barred from recovery because they entered into a novation with Test Corporation and this novation released Brunswick from its responsibility to compensate the plaintiffs. *See id.*

An employment manual that addresses severance and reemployment rights may be held to alter the at-will status of an employment agreement, creating a "contractual obligation[ ] when, with knowledge of their existence, employees start or continue to work for the employer."<sup>156</sup> Moreover, some jurisdictions have concluded that employee handbooks or policy manuals containing express or implied promises may create a binding contract.<sup>157</sup>

Courts have also held that policy statements indicating that laid off employees would be given first opportunity to fill new job openings are enforceable against the employer.<sup>158</sup> When a company has

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at 227. The Court of Appeals of Maryland disagreed with the trial court and found that a novation did not exist and that the employees were entitled to compensation from Brunswick. *See id.* at 228, 230.

156. *Id.* at 224.

157. *See Collins v. Elkay Mining Co.*, 371 S.E.2d 46, 52 (W. Va. 1988) (citing *Cook v. Heck's Inc.*, 342 S.E.2d 453 (W. Va. 1986)). In *Collins*, the plaintiff alleged "that he had been laid off and subsequently discharged by [Elkay] in retaliation for his refusal to 'falsify certain safety reports' pertaining to a safety inspection at [Elkay's] preparation plant where he was employed, and for his refusal to otherwise violate federal or State mine safety laws." *Id.* at 47. Aside from the wrongful discharge claim based on a violation of public policy, the employee brought a breach of contract claim against his employer. *See id.* at 51-52. The breach of contract claim was based on the employee's belief that he was to hold his position until retirement, so long as he performed his job duties competently and satisfactorily. *See id.* at 51. Collins alleged that said belief was a result of various publications of Elkay, which promised him and his family financial security until retirement. *See id.* The court stated the following:

A promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee's continuing to work, while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable.

... An employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons.

*Id.* However, the dissenting justice in *Collins* noted that "[e]ven in states that recognize implied employment contracts, an agreement for 'satisfactory performance' is not enforceable because it is a purely subjective term measured by the employer." *Id.* at 52 (Brotherton, J., dissenting).

158. *See Hepp v. Lockheed-Cal. Co.*, 150 Cal. Rptr. 408, 410-11 (Cal. Ct. App. 1978). Hepp was employed by Lockheed as a "Procurement Price Cost Administrator, Labor Grade 7," a salaried position which was considered management. *Id.* at 409. After working in the procurement department for over nine years, Hepp's group was "surplused" and he was "laid off suitable for rehire." *Id.* Hepp was told that the layoff was caused by an excessive number of workers and had no reflection on his work quality, and that he would eventually be called back to work. *See id.* Lockheed had a well-established policy of hiring back those employees who were laid off within the past two years and were qualified for the recently-vacated position before Lockheed would fill the position by promotion, transfer within the company, or by a new employee. *See id.* However, during the two year period following Hepp's layoff, six openings occurred for which Hepp was qualified and each time Lockheed overlooked Hepp's availability. *See*

a well-established policy for rehiring former/laid-off employees, the policy will be deemed "not merely a guideline for the benefit of management but a positive inducement for employees to take and continue employment with [the company]." <sup>159</sup> Any necessary consideration to be given by the employee in order for a contract to be formed would manifest itself in employees foregoing their rights to seek other employment based on the representations made in the form of employer policies. <sup>160</sup> Accordingly, it is recommended that severance and reemployment clauses not be included in employee handbooks.

Courts often rely on written materials provided by the employer to its employees when finding that contractual terms exist in an employment relationship. A court need not, however, limit itself only to written documents to determine the existence of an employment agreement. In certain instances, courts may also look to the words or actions of the parties when determining whether an employment contract exists between the employer and the employee.

## VI. ORAL EMPLOYMENT CONTRACTS

In general, all contracts must be in writing. <sup>161</sup> However, a contract may also be created orally, so long as the contract is not for a fixed term greater than one year. <sup>162</sup> Courts have defined the "per-

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*id.* Hepp sued for breach of the lay off policy and Lockheed defended, arguing that the "policies . . . are not a part of plaintiff's employment contract because they are not intended for his benefit and he did not give consideration for them." *Id.*

159. *Id.* at 411.

160. *See id.*

161. *See, e.g.,* MASS. GEN. LAWS ch. 259, § 1 (1996). Section 1 provides the following:

No action shall be brought:

First, to charge an executor or administrator, or an assignee under an insolvent law of the commonwealth, upon a special promise to answer damages out of his own estate;

Second, to charge a person upon a special promise to answer for the debt, default or misdoings of another;

Third, upon an agreement made upon consideration of marriage;

Fourth, upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them; or

Fifth, upon an agreement that is not to be performed within one year from the making thereof;

Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.

*Id.*

162. *See* CORBIN, *supra* note 1, § 444, at 446 (noting that the Statute of Frauds provides that "[n]o action shall be brought . . . upon any agreement that is not to be

formance within one year" provision such that an employer should proceed with caution when making oral promises to a present or prospective employee.

For instance, in *Whelan v. Integraph Corp.*,<sup>163</sup> the United States District Court for the District of Massachusetts found that an oral lifetime employment contract is not barred by the Statute of Frauds.<sup>164</sup> In *Whelan*, the defendant strongly recruited the plaintiff to be its New England district manager.<sup>165</sup> During the recruitment process, the prospective employee, who was now the plaintiff, was assured that "he could count on a long-term commitment from the defendant."<sup>166</sup> The plaintiff accepted the job offer and was subsequently terminated six months later.<sup>167</sup> The plaintiff then sued, alleging that the employer breached the lifetime employment contract.<sup>168</sup> The defendant, however, argued that the contract was unenforceable because it was both for a term longer than one year and not in writing.<sup>169</sup> However, the court held that the Statute of Frauds did not apply because the contract could have been performed within one year.<sup>170</sup> The court supported its holding by noting that "[b]ecause [the plaintiff's] contract was for permanent employment, it could have been performed within one year: [the plaintiff] could have died or [the defendant] could have discontinued its business, at which point its obligation to employ [the plaintiff] would end."<sup>171</sup>

However, it is quite different when the oral contract states a specific time at which the employment will end. In *Powers v. Boston Cooper Corp.*,<sup>172</sup> the oral contract began in 1960 when the plaintiff was thirty two years old.<sup>173</sup> The oral contract established that the plaintiff would work for the defendant until the age of sev-

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performed within the space of one year from the making thereof" (alteration in original)).

163. 889 F. Supp. 15 (D. Mass. 1995).

164. *See id.* at 17. *See supra* note 162 for the relevant language of the Statute of Frauds.

165. *See id.*

166. *Id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *Id.* (alterations in original) (quoting *Boothby v. Texon, Inc.*, 414 Mass. 468, 479, 608 N.E.2d 1028, 1035-36 (1993)).

172. 926 F.2d 109 (1st Cir. 1991).

173. *See id.* at 110.



enty.<sup>174</sup> The plaintiff, however, was terminated at the age of fifty nine.<sup>175</sup> The plaintiff then filed suit, alleging that his termination before the age of seventy was a breach of the oral employment contract.<sup>176</sup> The court held that since the contract could not have been performed in one year, the contract was unenforceable pursuant to the Statute of Frauds.<sup>177</sup> Thus, where an oral contract is general in nature, the contract will not be barred by the Statute of Frauds. However, when the contract specifies a specific period of employment, the contract must be in writing.

Employment relationships often bring exceptions to the Statute of Frauds into play. The first exception worth noting is the Doctrine of Promissory Estoppel.<sup>178</sup> Massachusetts courts first recognized this doctrine in *Cellucci v. Sun Co.*<sup>179</sup> In *Cellucci*, the court recognized three elements for finding promissory estoppel:

- (1) [a] representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2) [a]n act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; [and] (3) [d]etriment to such person as a consequence of the act or omission.<sup>180</sup>

This three-part test has since been applied in the context of employment relationships.<sup>181</sup> In *Hoffman v. Optima Systems, Inc.*,<sup>182</sup> the

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174. *See id.*

175. *See id.*

176. *See id.*

177. *See id.* at 111.

178. "A promise which the promisor would reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action of forbearance is enforceable notwithstanding the statute of frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires." RESTATEMENT (SECOND) OF CONTRACTS § 139(1) (1981).

179. 2 Mass. App. Ct. 722, 320 N.E.2d 919 (1974). In *Cellucci*, the plaintiff and defendant had negotiated for the sale of a parcel of land, but the defendant subsequently purchased from a different vendor. *See id.* at 723-27, 320 N.E.2d at 921-23. The plaintiff then sued for breach of a land sale contract. The defendant claimed the Statute of Frauds as an affirmative defense, asserting that since the agreement was not in writing it was unenforceable. *See id.* at 727, 320 N.E.2d at 923. The court found the contract to be enforceable based on the plaintiff's reliance on statements made by the defendant. *See id.* at 729, 320 N.E.2d at 924.

180. *Id.* at 728, 320 N.E.2d at 923.

181. *See generally* Frederick v. Conagra, Inc., 713 F. Supp. 41 (D. Mass. 1989); Hoffman v. Optima Sys., Inc., 683 F. Supp. 865 (D. Mass. 1988); Presto v. Sequoia Sys., Inc., 633 F. Supp. 1117 (D. Mass. 1986).

182. 683 F. Supp. 865 (D. Mass. 1988).

plaintiff worked for Polaroid when the defendants approached him to work for their company.<sup>183</sup> The plaintiff was promised that he would be "Vice President of Engineering and would be a full principal of Optima."<sup>184</sup> The plaintiff, relying on that promise, resigned from Polaroid and accepted the position at Optima.<sup>185</sup> During his employment at Optima, the plaintiff was not paid the full amount for his services rendered, was not paid according to the market value for his position, and was not reimbursed for \$7,500 worth of equipment which he had purchased with his own money for the benefit of the company.<sup>186</sup> These problems caused him to resign and subsequently sue for breach of the employment contract.<sup>187</sup> The defendant moved to dismiss the suit arguing that the contract was not in writing and thus violated the Statute of Frauds.<sup>188</sup> The court refused to dismiss the suit, finding that the "allegations, which [were] accepted as true for the purpose of this motion, [were] sufficient to show that Hoffman relied on the promises of Optima . . . to his detriment."<sup>189</sup> Thus, the court held that the defendants were estopped from asserting the statute of frauds as a defense.<sup>190</sup>

The second exception to the Statute of Frauds recognized in Massachusetts courts is quantum meruit.<sup>191</sup> Quantum meruit is the measure of damages used when the plaintiff seeks payment for services rendered.<sup>192</sup> In order to recover in quantum meruit, one must show that (i) the plaintiff bestowed a "measurable" benefit to the defendant, (ii) the defendant accepted the benefit bestowed "with the expectation of compensating the plaintiff," and (iii) the plaintiff expected to be compensated for these services.<sup>193</sup> Once shown, a plaintiff may recover the value of his services rendered, despite a failure to comply with the Statute of Frauds.<sup>194</sup> The fact

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183. *See id.* at 867.

184. *Id.*

185. *See id.*

186. *See id.*

187. *See id.*

188. *See id.* at 869.

189. *Id.* at 870.

190. *See id.*

191. *See generally* Bolen v. Paragon Plastics, Inc., 747 F. Supp. 103 (D. Mass. 1990).

192. *See id.* at 106.

193. *Id.* at 106-07.

194. *See* Green v. Richmond, 369 Mass. 47, 49-50, 337 N.E.2d 691, 694 (1975), *abrogated on other grounds by* Wilcox v. Trautz, 427 Mass. 326, 693 N.E.2d 141 (1998); *see also* Heil v. McCann, 360 Mass. 507, 511, 275 N.E.2d 889, 892 (1971) ("One who has rendered valuable services pursuant to an oral contract, which cannot be enforced on account of the statute of frauds, may recover the fair value of the services rendered.").

finder will be responsible for determining whether these elements have been met.<sup>195</sup> Therefore, although employers may often use the statute of frauds as a defense to oral contracts, caution must nonetheless be employed when engaging in discussions which may be perceived as setting forth contractual terms.

### CONCLUSION

The intricacies of labor and employment law, both at the federal and state level, dictate that employers must use care to communicate clearly, fairly, and legally with potential applicants, actual applicants, and employees. Various laws concerning the employment relationship dictate a number of obligations that the employer has to current and prospective employees. The employer's failure to act in accordance with these various laws may cause unanticipated legal liability. However, an employer's best defense may very well be a good offense. In this respect, it is crucial that employers seek legal counsel before taking any action which has the potential to create, affect, alter, or terminate current and future employment relationships.

Advertisements, applications, employment contracts, employment manuals, and employment procedures can all have a significant impact on the employment relationship. From the employer's perspective, it is important that the employment relationship be reduced to a detailed document which minimizes the potential for uncertainty and misunderstanding in the future.

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195. See *Green*, 369 Mass. at 53, 337 N.E.2d at 696.